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SUPREME COURT, U.S.

No. 502

In the Supreme Court of the United States

OCTOBER TERM, 1961

WISCONSIN BANKERS ASSOCIATION ET AL., PETITIONERS

v.

ALBERT J. ROBERTSON ET AL., COMPRISING THE FEDERAL HOME LOAN BANK BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court for the District of Columbia (J.A. 80–88) [1] is reported at 190 F. Supp. 90. The opinions in the Court of Appeals for the District of Columbia Circuit (Pet. App. A 41–48) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 13, 1961. A timely petition for rehearing was denied on

[1] "J.A." refers to the joint appendix in the court of appeals, a part of the record before this Court.

August 10, 1961. The petition for certiorari was filed on October 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether regulations and charter provisions promulgated by the Federal Home Loan Bank Board, and maintained since 1949, which provide that federal savings and loan associations shall raise their capital by accepting payments on savings accounts representing share interests in the associations are in accord with Section 5(b) of the Home Owners Loan Act of 1933, as amended, and are, therefore, legal and valid.

STATUTES INVOLVED

Section 5 of the Home Owners Loan Act of 1933 and relevant regulations of the Federal Home Loan Bank Board are set forth in the Appendix, *infra,* pp. 11–15.

STATEMENT

Section 5 of the Home Owners Loan Act of 1933, App., *infra,* p. 11, authorized the organization of Federal Savings and Loan Associations "[i]n order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes * * *." For this purpose, the Federal Home Loan Bank Board [2] was authorized, under rules and regulations which it was to promulgate, to provide for the organization and operation of these institutions. Pursuant to this authority, the Board promulgated such regulations, which have been

[2] The Federal Home Loan Bank Act of 1932 created the Board, 47 Stat. 725, 12 U.S.C. 1421, *et seq.*

amended from time to time. (J.A. 61.) In particular, upon publication of notice of proposed rule making in the Federal Register on March 11, 1949 (14 F.R. 1101), these rules and regulations were amended in the Spring of 1949, and as amended were published in the Federal Register on July 16, 1949 (14 F.R. 3980).

Petitioners, the Wisconsin Bankers Association and several banks operating in Wisconsin, instituted this action against the Federal Home Loan Bank Board challenging, under Section 5 of the Act, the validity of these 1949 regulations which, in substance, provide that associations may raise their capital by payments into savings accounts. Petitioner sought a declaration of invalidity, a restoration of those regulations prevailing prior to the 1949 amendments, and other relief. (J.A. 4–25.)[3]

Initially, a motion for summary judgment made by respondents was denied on the ground that there were issues of fact which required resolution. (J.A. 2.) Pretrial proceedings were then held, at which the parties stipulated that disposition of the case could be expedited if two dispositive threshold questions should be first decided on stipulated facts. It was agreed that, in the event either issue was decided in favor of respondents, the action should be dismissed. (J.A. 67.) These issues concerned the legality of the

[3] Prior to the institution of suit, petitioner Wisconsin Bankers Association sought similar relief from the Board. (Ex. A to complaint, J.A. 26–48.) Respondents denied such relief in a resolution dated April 3, 1958. (Ex. B to complaint, J.A. 49–50.)

regulations and petitioners' standing to sue. The district court, upon the recommendation of the Pretrial Commissioner, ordered these two issues scheduled for hearing on briefs and oral arguments. (J.A. 78–79.) In a memorandum opinion the court held that petitioners had standing to maintain the action but dismissed the action upon the ground that the challenged regulations were valid. (J.A. 80–90.)

Petitioners then appealed to the Court of Appeals for the District of Columbia Circuit. (J.A. 91.) That court affirmed the judgment below, holding that the regulations were valid; it refused to consider the standing question "in the absence of a cross appeal." (Pet. App. 43.) [*]

ARGUMENT

Petitioners seek to invalidate long-standing regulations of the Federal Home Loan Bank Board on the ground that they permit federal savings and loan associations to raise capital by means of "deposits" which are specifically prohibited by Section 5 of the Home Owners Loan Act of 1933, App., *infra*, p. 11. This claim is based on the use in the regulations of the term "savings account" and the fact that "withdrawals" from these accounts are permitted. Both

[*] In view of the decision of the Court of Appeals on the merits, an appellate decision on the question of standing was not necessary to an affirmance of the judgment of the district court. We submit, however, that, contrary to the court below, a cross appeal was not necessary in order to put the question of standing to sue before the court. In the event that certiorari is granted, we reserve the right to urge, in the alternative in support of the judgment below, that petitioners lack standing to maintain this action.

courts below, after detailed consideration of pertinent regulations and Section 5, determined that the regulations are fully consistent with the statute. The decision is clearly correct and there is no occasion for further review by this Court.

1. Section 5 of the Act, *infra,* p. 11, provides that Federal associations "shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided", but that "no deposits shall be accepted." In implementation of this provision, the Board's regulations provide (12 C.F.R. 545.1) that the capital of an association:

> may be raised through payments on its savings accounts in the form of cash, or of property * * *.

Section 541.3 of 12 C.F.R. defines the capital as "the aggregate of the payments on savings accounts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom." "Savings account" is defined as the "monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest." 12 C.F.R. 541.5. Thus, the regulations provide that an association raises capital by payment into a savings account, which is in itself a share in the association's capital, and that the holder of a savings account is a share-owner not a creditor.

This is borne out by the other regulations. Section 543.3 of 12 C.F.R. provides, as one of the organization

procedures, that "subscriptions to such Federal association's capital" is to be in the following form:

> Having been given permission to organize a Federal association, the undersigned hereby subscribe for the amount of capital indicated below, and contract to pay into a savings account, upon the issuance of a charter, the amount of cash stated opposite their respective names below. We agree to cooperate in the development of such an association for the promotion of local savings and home-financing. * * *

And charters prescribed by the regulations state that an association is empowered "[t]o raise its capital * * * by accepting payments on savings accounts representing share interests in the association." 12 C.F.R. 544.1(a), par. 3(6), 544.1(b), par. 3(6). Holders of savings accounts in an association so chartered must be issued (12 C.F.R. 545.2(b)):

> an account book, or a separate certificate, evidencing the ownership of the account and the interest of the holder thereof in the capital of such Federal association.

Similarly, although paragraph 6 of the association charters permits an association to pay the withdrawal value of a "savings account" at any time upon written request (12 C.F.R. 544.1(a) par. 6, (b) par. 6), when the association is unable to pay all withdrawal requests within a period of 30 days, the association then numbers and files all withdrawal requests in the order received and proceeds with payment as prescribed in 12 C.F.R. 545.4(a). App., *infra*, p. 15. See also 544.1(b), par. 6. Paragraph 6 of the pre-

scribed charters further provides that (12 C.F.R. 544.1(a) par. 6, 544.1(b) par. 6):

> Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid *and shall not become creditors.* [Emphasis added.]

From these regulatory provisions it is clear that, whatever their similarities in name and practical operation, the savings accounts authorized by the regulations are not the legal counterpart of a deposit in a bank, and the relationship of holders of savings accounts to the associations is significantly different from the debtor-creditor relationship that exists between a depositor and a bank. Cf. Pet. App. 47.

In short, it is clear that the regulations as amended in 1949 effected no change either in the structure of federal savings and loan associations or in the relationships of the holders of "savings accounts" to the associations.

2. Petitioners' basic position apparently is that the use of the term "savings account," of itself, renders the regulations invalid under the Act. Such a position cannot be maintained. It is answered by the Congressional choice of title for these associations, *i.e., savings* and loans associations. And it is plainly rebutted by the legislative history of the Act, from which it is clear that the Congress was aware that these associations would compete for private savers' funds.[5] Unlike petitioners' depositors, however,

[5] "The bill also provides for the Board to charter Federal savings and loan associations in communities now insufficiently served by any institution or other lender on homes, so that

members of an association holding savings accounts pay for a share of capital, as Section 5(b) requires; and though they may withdraw their interests, they are subject to a waiting period, as well as a proration of funds in the event of an emergency. They are share-owners, not depositors.

3. The court below referred to its own decision in *Aetna Casualty and Surety Co.* v. *Porter*, No. 16,066, pending on petition for a writ of certiorari, No. 549 Misc., this Term. There, the question is whether accounts in savings and loan associations established by an incompetent veteran's committee with funds

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provision may be made for the financing of homes in more than 1,500 counties in the United States now having no such facilities. *These associations are intended as permanent associations to promote the thrift of the people locally to finance their own homes and the homes of their neighbors.* To enable the Board to promote and develop these associations in areas not now served an appropriation of $250,000 is authorized. *To encourage the people to save their own funds for their own use in these associations*, provision is made for the Secretary of the Treasury to subscribe not exceeding $100,000 of preferred stock in such associations, provided the local public have actually put in in cash as much money as the Secretary of the Treasury subscribed, and an appropriation of $100,000,000 is authorized to enable the Secretary of the Treasury to take this stock. *This provision is intended to raise from private savers* and from possible borrowings from the Federal home-loan bank and from the money subscribed by the Secretary of the Treasury at least about $3 to loan on homes for each dollar put up by the United States." [Emphasis added.] [H. Rep. No. 55, 73d Cong., 1st Sess. 2. See also S. Rep. No. 91, 73d Cong., 1st Sess. 2.]

See also, the remarks of Representatives Thom and Hancock with regard to insurance of accounts in savings and loan associations, 78 Cong. Rec., Part 10, at 11209. See also the remarks of Representative Reilly, *id.* at 11195–96.

derived under veterans' benefit laws are exempt from the claims of creditors under 38 U.S.C. 3101(a). The Court of Appeals held that such accounts were not exempt. The United States has filed a memorandum as *amicus curiae* in No. 549 Misc., in support of the veteran's committee's petition for a writ of certiorari. The government's positions in No. 549 and this case are fully consistent.

In No. 549, we note that accounts in savings and loan associations have attributes both of an investment and an interest-bearing deposit, and we assert that the purposes of 38 U.S.C. 3101(a), "[t]o safeguard the estates of veterans derived from payments of pension," and "to make * * * benefit payments available for use in the current maintenance and support of the veteran, without interference by taxes or creditors," would be defeated by subjecting such accounts to the claims of creditors. In the present case, the issue is not the coverage of a liberal immunity provision like 38 U.S.C. 3101(a), but the reach of specific technical requirements pertaining to the raising of capital by federal savings and loan associations. Our position is that the challenged regulations create procedures and legal interests significantly different, in legal contemplation, from the type of deposits proscribed by Section 5 of the Home Owners Loan Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

Section 5 of the Home Owners Loan Act of 1933, 48 Stat. 132, as amended, 12 U.S.C. 1464, provides in relevant part as follows:

> *Federal Savings and Loan Associations—Organization authorized.*
>
> (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be know as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.
>
> *Capital; deposits; certificates of indebtedness.*
>
> (b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

The pertinent provisions of Title 12 of the Code of Federal Regulations are:

> 12 C.F.R. 541.3—*Capital.*—The term "capital" means the aggregate of the payments on savings accounts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom.

12 C.F.R. 541.4—*Savings Account.*—The term "savings account" means the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest.

12 C.F.R. 541.5—*Short-term savings account.*—The term "short-term savings account" means a savings account in a Federal association which is to be withdrawn in less than twenty-four months from the date on which such account is opened * * *.

12 C.F.R. 543.3—Having been given permission to organize a Federal association, the undersigned hereby subscribe for the amount of capital indicated below, and contract to pay into a savings account, upon the issuance of a charter, the amount of cash stated opposite their respective names below. We agree to cooperate in the development of such an association for the promotion of local savings and home-financing.

12 C.F.R. 544.1(a), par. 4,544.1(b) par. 4—* * * All savings accounts shall be nonassessable.

12 C.F.R. 544.1(a), par. 6—*Withdrawals.*—The association shall have the right to pay the withdrawal value of its savings accounts at any time upon application therefor and to pay the holders thereof the withdrawal value thereof. Upon receipt of a written request from any holder of a savings account of the association for the withdrawal from such account of all or any part of the withdrawal value thereof, the association shall within 30 days pay the amount requested; *Provided*, That if the association is unable to pay all withdrawals requested at the end of 30 days from the date of such requests, it shall then pay all withdrawals requested in accordance with such methods and procedures as to amounts and allotments of funds for such purposes as shall be provided in regulations made by the Federal Home Loan Bank Board

in effect at the date of the request for withdrawal. Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid and shall not become creditors.

12 C.F.R. 544.1(b), par. 6—*Withdrawals.*—The association shall have the right to pay the withdrawal value of its saving accounts at any time upon application therefor and to pay the holders thereof the withdrawal value thereof. Upon receipt of a written request from any holder of a savings account of the association for the withdrawal from such account of all or any part of the withdrawal value thereof, the association shall within 30 days pay the amount requested; *Provided,* That if the association is unable to pay all withdrawals requested at the end of 30 days from the date of such request, it shall then proceed in the following manner while any withdrawal request remains unpaid for more than 30 days:

Withdrawal requests shall be paid in the order received and if any holder of a savings account or accounts has requested the withdrawal of more than $1,000, he shall be paid $1,000 in order when reached and his withdrawal request shall be charged with such amount as paid and shall be renumbered and placed at the end of the list of withdrawal requests, and thereafter, upon again being reached shall be paid a like amount, but not exceeding the withdrawal value of his savings account, and until such withdrawal request shall have been paid in full, shall continue to be so paid, renumbered, and replaced at the end of the withdrawal requests on file: *Provided,* That when any such request is reached for payment, the association shall so advise the holder of such savings account by registered mail to his last address as recorded on the books of the association and, unless such holder shall apply in person or in writing for the pay-

ment of such withdrawal request within 30 days from the date of the mailing of such notice no payment on account of such withdrawal request shall be made and such request shall be cancelled: *And provided further,* That the board of directors shall have absolute right to pay on an equitable basis an amount not exceeding $200 to any holder of a savings account or accounts in any calendar month and without regard to any other provision of this section.

When the association is unable to pay all withdrawal requests within a period not exceeding 30 days from the date of receipt of written request therefor it shall allot to the payment of such requests the remainder of the association's receipts from all sources after deducting from total receipts appropriate amounts for expenses, required payments on indebtedness, earnings distributable in cash to holders of savings accounts, and a fund for general corporate purposes equivalent to not more than 20 percent of the association's receipts from holders of its savings accounts and from its borrowers. Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid and shall not become creditors.

12 C.F.R. 544.1(a), par. 10, 544.1(b) par. 10—*Reserves, surplus, and distribution of earnings.*—* * * As of June 30 and December 31 of each year, after payment or provision for payment of all expenses, credits to general reserves and such credits to surplus as the board of directors may determine, and provision for bonus on savings accounts as authorized by regulations made by the Federal Home Loan Bank Board, the board of directors of the association shall cause the remainder of the net earnings of the association for the 6 months' period to be distributed promptly on its saving accounts, ratably, as declared by the board of directors, to the withdrawal value thereof; * * *

12 C.F.R. 545.1—*Savings accounts.*—The capital of a Federal association may be raised through payments on its savings accounts * * *.

12 C.F.R. 545.2—*Evidence of ownership.*—(a) *Signature card.* In connection with the issuance of a savings account a Federal association shall obtain a card containing the signature of the owner of such account * * * (b) *Account books and certificates.* A Federal association that has Charter N shall issue to each holder of its savings account an account book, or a separate certificate, evidencing the ownership of the account and the interest of the holder thereof in the capital of such Federal association; * * *.

12 C.F.R. 545.4(a)—Withdrawal requests shall be paid in the order received and if any holder of a savings account or accounts has requested the withdrawal of more than $1,000, he shall be paid $1,000 in order when reached and his withdrawal request shall be charged with such amount as paid and shall be renumbered and placed at the end of the list of withdrawal requests, and thereafter, upon again being reached, shall be paid a like amount, but not exceeding the withdrawal value of his savings account, and until such withdrawal request shall have been paid in full, shall continue to be so paid, renumbered, and replaced at the end of the withdrawal requests on file: *Provided,* That when any such request is reached for payment, such association shall so advise the holder of such savings account by registered mail to his last address as recorded on the books of the association and, unless such holder shall apply in person or in writing for the payment of such withdrawal request within 30 days from the date of the mailing of such notice, no payment on account of such withdrawal request shall be made and such request shall be cancelled: * * *.

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